IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.RAMACHANDRAN
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

MFA.No. 1007 of 2002

IC.104/1999 OF EMPLOYEES INSURANCE COURT, ALAPPUZHA

APPELLANTS: RESPONDENTS
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1. THE EMPLOYEES STATE INSURANCE CORPORATION, REGIONAL OFFICE, PANCHADEEP BHAVAN, SWARAJ ROUND NORTH, THRISSUR-680 020, REPRESENTED BY ITS REGIONAL DIRECTOR.

2. THE RECOVERY OFFICER, REGIONAL OFFICE, EMPLOYEES STATE INSURANCE CORPORATION, PANCHADEEP BHAVAN, SWARAJ ROUND NORTH, THRISSUR-680 020.

BY ADV. SRI.T.P.M.IBRAHIM KHAN, SC

RESPONDENTS: APPLICANTS
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1. K.N.PREMANANDAN, KURATHUPARAMBIL HOUSE, CHETTIKKAD, PATHIRAPPALLY P.O., ALAPPUZHA DISTRICT

2. K.N.VIDYANANDAN, KURATHUPARAMBIL HOUSE, CHETTIKKAD, PATHIRAPPALLY P.O., ALAPPUZHA DISTRICT

BY ADV. SRIR.AZAD BABU

THIS MISC. FIRST APPEAL HAVING COME UP FOR ADMISSION ON 25/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M. Ramachandran & S. Siri Jagan, JJ.

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M.F.A No. 1007 of 2002

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Dated this, the 25th January, 2007.

J U D G M E N T

Siri Jagan, J.

This appeal is filed at the instance of the Employees State Insurance Corporation against the order of the Employees Insurance Court, Alappuzha in I.C.No. 104/1999 raising the following substantial questions of law:

> (1) Whether the Financial difficulties or the pendency of litigation will absolve the Employer from the payment of damages by way of Penalty.
>
> (2) Whether Sakthi Tiles' case (Supra) will empower the E.I. Court to reduce the quantum of damages imposed on the ground of pendency of litigation and the financial difficulties.
>
> (3) Whether Section 85-B of the Employees State Insurance Act and the Regulation given unfettered right to the Corporation to impose damages by way of penalty for the belated payment of Contribution upto 100 percent."

The basic facts from which the above questions of law are sought to be raised are as detailed under.

2. The respondents herein were the employers who filed the I.C challenging the order of the appellants imposing on them damages to the tune of Rs.79,969/- under Section 85B of the Employees State Insurance Act, 1948 for delayed payment of contributions for the period from October, 1986 to March,1987, October, 1987 to March, 1988, April, 1988 to March, 1989 and May, 1990 to March, 1991. In the I.C, the employers, after admitting that there was, in fact, delay in payment of contributions, contended that for that delay, no damages could have been imposed under Section 85B, since the delay was on account of the pendency of litigations in respect of the liability to pay contributions themselves as also financial difficulties. The appellants herein contended before the Insurance Court that once delay is admitted, the fact that there were litigations pending and the

employers were in financial difficulties are not factors which could be taken into account to reduce the damages payable under Section 85B of the Act, imposition of which is at the discretion of the authorised officer under Section 85B. Repelling these contentions, based on a Division Bench decision of this Court in Regional Director, E.S.I Corporation v. Sakthi Tiles, [1988 (2) KLT 280], the Insurance Court reduced the damages leviable to Rs. 27,500/-. This decision of the Insurance Court, is under challenge in this appeal.

3. First we shall consider the second question of law raised as above as to whether the Insurance Court has jurisdiction to consider the question of waiver or reduction of damages imposed under Section 85B in exercise of its jurisdiction under Section 75 of the Act.

4. Of course, Section 75 which is the provision under which the I.C has been filed, does not specifically refer to damages as such. But, clause (g) of sub-section (i) of Section 75 would be relevant for our purpose in deciding this question, which reads as under:

> "**75. Matters to be decided by Employees' Insurance Court:-** (1) any question or dispute arises as to--
>
> xx xx xx
>
> (g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act,
>
> such question or dispute, subject to the provisions of sub-section (2A) shall be decided by the Employees Insurance Court in accordance with the provisions of this Act."

Although, this clause does not specifically refer to damages as such, it specifically refers to other dues payable or recoverable under the Act. We are of opinion that the question as to whether the damages

imposed under Section 85B is justifiable or whether the quantum of damages imposed is in accordance with principles for computing the damages is certainly a dispute, which would fall within the ambit of clause (g) of Section 75(1). We are supported in this view by two Division Bench decisions of this Court. First is the case referred to by the Insurance Court itself, namely, Sakthi Tiles's case, wherein, this Court has categorically held as follows:

> " . . . . . In this perspective, we hold that the Insurance Court which is a proper forum prescribed by the Act to adjudicate as to whether the order or proceeding initiated by the Corporation to recover damages is justified can evaluate the entire matter, and if it is satisfied that there are extenuating circumstances, it can dispense with the recovery of damages, or delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, is deserved in the circumstances.

Following the said decision, another Division Bench of this Court in E.S.I. Corporation v. Hindustan Tile Works, 1999 (2) KLT 851, specifically answered this question with reference to Section 75(1)(g) as follows:

> "On detailed consideration of the arguments raised by both sides, we are not convinced that there is any merit in the aforesaid contention of the appellant. The first contention that the E.S.I. Court had no jurisdiction to adjudicate the matter has no merit in view of the specific provisions in S. 75(1)(g) of the Act which empowers the court to adjudicate on any dispute on any matter which is in dispute between a principal employer and the Corporation, in respect of any contribution or benefit or other dues payable or recoverable under the Act or any other matter required to be or which may be decided by the Employees' Insurance Court under the Act. The penalty contemplated in S. 85-B definitely falls under 'other dues' contemplated in the aforesaid provision and as such the Employees' State Insurance Court had full jurisdiction to decide the issue."

5. In view of the above findings of the two Division Benches, with which we respectfully agree, we have absolutely no doubt in our mind that the Insurance Court has jurisdiction to decide the question as to whether damages imposed under Section 85-B of the Act is justifiable or not.

6. The other questions of law raised by the appellants in this

appeal essentially relate to the various aspects of imposition of damages under Section 85-B and therefore can be considered together.

7. Before going into these aspects, we may observe that the wording of Section 85-B was not the same as sit stood in the statute book at the time of Sakthi Tiles's case. Therefore, we shall first note Section 85-B as it stood prior to 1989. At that time, Section 85-B read thus:

> "**85B: Power to recover damages**:- (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer such damages not exceeding the amount of arrears as may think fit to impose:
>
> Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard."
>
> (Emphasis supplied)

Thereafter, amendments were introduced to Section 85-B, by Act 29 of 1989 with effect from 1-1-1992 and thereafter Section 85-B reads as follows:

> "85-B. Power to recover damages:- Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations:
>
> Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard:
>
> Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be

specified in regulations.

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue or under section 45C to section 45-I."

(Emphasis supplied)

We are not unaware of the fact that the periods of delay in payment of contribution in this case are between October, 1986 to March, 1991 and in fact except for three months, damages imposed related to the pre-amendment period of Section 85-B. But, we are of opinion that in the view we are inclined to take, the same is not material at all for deciding this case.

8. Before amendment, the wording used was different in the section. At that time, the words used were "the Corporation may recover from the employer such damages, not exceeding the arrears as it may think fit to impose." This wording was changed as "the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations." As such, by the amendment, the legislature had made it abundantly clear that the imposition of damages by way of Section 85-B is in the nature of penalty. But, even without the word 'penalty' in that section prior to the amendment, in the decision of Shakti Tiles's case, a Division Bench of this Court came to the conclusion that the imposition of damages under Section 85-B is in the nature of penalty which only has been subsequently made clear by the legislature by amending the section, by expressly stating that the power to recover damages under Section 85-B is by way of penalty. If imposition of damages is by way of penalty, then such damages can be imposed only in accordance with the principles applicable for imposing penalty for failure to carry out a statutory obligation.

9. The Supreme Court had, as early as in 1970, in the decision of M/s. Hindustan Steel Ltd. v. The State of Orissa, AIR 1970 S.C.

253, laid down guidelines in the matter of imposition of penalty for failure to carry out a statutory obligation in the following words:

> " . . . . . An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. . . . ."
>
> (Emphasis supplied)

Although, Shakthi Tiles's case does not specifically refer to the above Supreme Court decision, the Division Bench had, in fact, borrowed the words of the Supreme Court in the above decision in coming to the following conclusion:

> "It was not disputed that from any levy of damages it is open to the employer to take up the matter before the Insurance Court under S. 75 read with S.78 of the Act. The only question focussed was that the Insurance Court cannot interfere with the quantum of damages. A mere look at S. 85B will show that even where the employer fails to pay the amounts due in respect of any contribution payable under the Act, it is not obligatory o the Corporation to levy or recover damages. The power to levy damages is discretionary. The section has only stated, the maximum amount that can be so recovered. The power to levy and recover damages provided in S. 85B of the Act is in the nature of a quasi-penal provision. An order, levying damages for failure to pay the amount due in respect of any contribution payable under the Act, is a quasi judicial proceeding. The proviso to S. 85B itself indicates that before recovering such damages, the employer should be given a reasonable opportunity of being heard. It postulates that there should be an adjudication in the matter. Since the failure to carry out the statutory obligation should be adjudicated by a quasi judicial enquiry, and the levy of damages is quasi penal in character, we are

of the view that such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. The mere fact that the Corporation is empowered to recover damages does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case. It is to be noted that the statutory provision does not prescribe any minimum to be recovered as damages. What is provided is the maximum that can be recovered. We are of the view, that since the opportunity that is provided before recovering the damages should be effective and meaningful, the authority empowered to levy damages should have the discretion either to levy the damages or to dispense with the levy of the damages. The Corporation will not be justified in levying the damages in case where the employer, or the person,who is bound to pay the amount in respect of the contribution payable in this regard, is able to offer sufficient or cogent explanation for non-remittance, or in case where there is only a technical or venial breach of the provision of the Act, or there exists bona fide circumstances, which will point out that there was no deliberate omission on the part of the employer. In this perspective, we hold that the Insurance Court, which is a proper forum prescribed b the Act to adjudicate as to whether the order or proceeding initiated by the Corporation to recover damages is justified, can evaluate the entire matter, and if it is satisfied that there are extenuating circumstances, it can dispense with the recovery of damages, or delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, is deserved in the circumstances. Delivering the judgment of the Bench, Subramonian Poti, J. in C.L. Anand v. Regional Director, (1980 KLT 139 : 1980 Lab I.C. 90) stated thus:

> "Being a provision which confers a power to impose penalty, S. 85(B) of the Employees' State Insurance Act must be taken to confer a discretion on the Regional Director in the matter of determining the quantum. But, that discretion calls for objective exercise within the limit pointed out in that Section and such exercise must be apparent in the order. We have also indicated that it is necessary to find guilty conduct on the part of a parity to justify the imposition of damages and the quantum of guilt or the gravity of misconduct should naturally determine the gravity of the punishment. Therefore while one would not expect the order of the Regional director to state with precision how exactly the damages have been assessed, it must be possible to see

> from the order the presence of punitive circumstance justifying the imposition of damages and the gravity of the punitive element. That would be necessary to appreciate whether the damages imposed could be said to be reasonable. . . . . If the damages is imposed as merely related to the delay without reference to the punitive element, that may not be justifiable."
>
> We fully concur with the above statement of the law. In I.C. 20 of 1986 the Insurance Court held that the period of delay in remitting the amount varies from 11 days to 473 days and mechanical levy of 19 per cent damages for all the periods is irrational and unfair. So holding, the Insurance Court directed the Corporation to fix damages at the rate of 10 per cent for all periods involved in the case. Similarly, in I.C.42 of 1986 the Insurance Court adverted to the fact that the employer (applicant) is a Co-operative Society registered under the Co-operative Societies Act and the Government has register it as a sick unit. In view of the matter, interests of justice require a reduction of damages and directed the Society to pay 10 per cent of the contribution as damages. We are of the view that the direction given by the Insurance Court to limit the percentage of damages in both the cases at 10 per cent is well justified and do not call for any interference. The Insurance Court has acted in accordance with law. At any rate we are of the view, that no substantial question of law is involved in both these appeals."
>
> (Emphasis supplied)

This decision was followed by another Division Bench in Hindustan Tile Works's case and quoting the first of the passages quoted above, the Division Bench followed the said decision and held that unless, by not paying the contributions in time, employers have acted either deliberately or in defiance of law or are guilty of contumacious or dishonest conducts and acted in disregard of its obligation, penalty cannot be imposed by way of damages under Section 85-B. We also note that in a still later Division Bench decision of this Court in E.S.I Corporation v. Bhaskaran, reported in 1998 (1) KLT S.N. 24 at page 28, it was held that since the failure to carry out the statutory obligation should be adjudicated by a quasi judicial enquiry and the levy of damages is quasi penal in character, such damages will not ordinarily be imposed unless the party obliged to pay the amount due

acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. Since all these decisions categorically use the very same words used by the Supreme Court in Hindustan Steel Ltd.'s case, it is apparent that all the Division Benches were of the unanimous opinion that the imposition of damages under Section 85-B regardless of the change in wording before and after amendments was in the nature of penalty and therefore the principles enunciated by the Supreme Court in that decision regarding imposition of penalty, squarely apply to recovery of damages under Section 85-B.

10. Of course, the appellants have another case that by virtue of the introduction of the said second proviso to Section 85-B, the interference with the discretion exercised by the Corporation to impose damages can only be in cases covered by the said proviso, ie, only in cases were the establishment on which the damages are to be imposed is a sick industrial company in respect of which a claim for rehabilitation has been sanctioned by the BIFR under the Sick Industries Companies (Special Provisions) Act, 1985. We are unable to agree. That proviso was introduced in tune with the object and purpose of the Sick Industries Companies (Special Provisions) Act, 1985 and does not exclude the necessity to consider the question as to whether damages are to be imposed or how much damages are to be recovered taking into account the circumstances which compelled the employer to commit default in payment of contributions. Right of hearing was always a precondition before imposition of damages and if we accept the contentions as raised by the Corporation, we may have to totally ignore the first proviso, which, of course, would amount to going against the express words of the Statute, and is uncalled for. Therefore, even in cases where the establishment is not a sick industrial company, the principles enunciated in the above said

decisions would squarely apply notwithstanding the introduction of second proviso to Section 85-B.

11. In this connection, an argument has also been raised by the appellants on the basis of Regulation 31C of the Employees State Insurance (General) Regulations, 1950 which reads as under:

> "3C. Damages or contributions or any other amount due, but not paid in time:- If an employer fails to pay contributions within the periods specified under regulation 31, or any other amount payable under the Act, the corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:
>
> | Period of delay | Maximum rate of damages in per cent per annum of the amount due. |
> |---|---|
> | (i) Less than 2 months | 5% |
> | (ii) 2 months and above But less than 4 months | 10% |
> | (iii) 4 months and above but less than 6 months | 15% |
> | (iv) 6 months and above | 25% |
>
> Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may:-
>
> (a) in case of a change of management including transfer of undertaking(s) to workers' Co-operative(s) or in case of merger of amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;
>
> (b) in other cases, depending on its merits, waive upto 50 per cent damages levied or leviable;
>
> (c) in exceptional hard cases, waive either totally or partially the damages levied or leviable."

Counsel for the appellants would submit that since under Section 85-B, the penalty to be imposed as damages for delayed payment of contribution is as specified in the regulations, and Regulation 31C

specifically lays down the percentage of damages to be imposed on the basis of the period of delay, all what the Corporation is bound to take into account is the extent of delay for deciding the damages imposed. That also may not be the correct interpretation of the provisions. At the most, Regulation 31C would only be guidelines in the matter of imposition of damages. Further, Regulation 31C also specifically states not exceeding the rates mentioned below, which shows that the percentage fixed there is not absolute. This is exemplified by the fact that in the proviso to Regulation 31C in the case of a sick industrial company, separate guidelines have been prescribed for imposition of damages, which also would go to show that the discretion vested in the Corporation under Section 85-B read with Regulation 31C has to be exercised judicially. The same being by way of penalty, the Corporation is bound to adhere to the principles for imposition of penalty as laid down in Hindustan Steel Ltd.'s case.

12. Viewed thus, the fact that there were three litigations pending before the Insurance Court, namely, I.C.Nos. 23/1988 and 63 and 64 of 1993 in respect of the liability of the respondents herein to pay contributions itself and the financial difficulties projected by them are certainly matters which should have been taken into account by the Corporation while imposing damages under Section 85-B for delayed payment of contribution for the periods in question under Section 85-B.

13. In this connection, we may note with approval the decision rendered by one of us (S. Siri Jagan, J.) in the decision of Indian Telephone Industries Ltd. v. Asst. P.F. Commissioner & others, reported in 2006 (3) KLJ 698, albeit in the context of imposition of damages under Section 14-B of the Employees Provident Funds and Miscellaneous Provisions Act ('Provident Fund Act' for short). We note that the provisions relating to imposition of damages for delayed

payment of contribution under both these enactments are in pari materia. The amendment brought out in the section are also identical. Prior to the amendment of Section 14-B in 1988, in the Provident Fund Act, the Section read thus:

> "Power to recover damages:- Where an employer makes defaults in the payment of any contribution to the Fund (the Family Fund or the Insurance Fund) or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 (for sub-section 17) or in the payment of any charges payable under any other provision of this Act or of (any scheme or Insurance Scheme) or under any of the conditions specified under Section 17, (the Central Provident Fund Commissioner, or such other office as may be authorised by the Central Government, by notification in the official gazette in this behalf) may recover from the employer such damages, not exceeding the amount of arrear, as it may think fit to impose:
>
> Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard.: (Emphasis supplied)."

Later on, the said Section was amended by Act 33/1988, after which the Section reads as follows:

> "14-B. Power to recover damages:- Where an employer makes default in the payment of any contribution to the Fund (the Family Pension Fund of the Insurance Fund) or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 (or sub-section (5) of Section 17) or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under Section 17, officer as may be authorised by the Central Government by notification in the official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears as may be specified in the Scheme:
>
> Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:
>
> Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the

> Board for Industrial Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme. " (Emphasis supplied).

Clause 32A in Employees Provident Fund Scheme is somewhat similar to Regulation 31C of the ESI Act, which reads thus:

> "**32A. Recovery of damages for default in payment of any contribution**:- (1) Where an employer makes default in the payment of any contribution to the fund, or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under Section 17 of the Act, the Central Provident Fund Commissioner or such officer as may be authorised by the Central Government, by notification in the Official Gazette in this behalf, may recover from the employer by way of penalty, damages at the rates given below:-
>
> | Period of Default | Rates of damages (% of arrears per annum. |
> |---|---|
> | (a) Less than two months | 17 |
> | (b) Two months and above But less than four months. | 22 |
> | (c) Four months and above But less than six months. | 27 |
> | (d) Six months and above | 37" |

Considering the above said provisions, in the above said decision, the learned Judge held as follows:

> "16. I am of opinion that merely because there is belated payment of contributions, liability to pay damages does not automatically arise, but the same shall be decided by applying mind to the merits of each case and not by resorting to mere arithmetic calculation of damages. Even though liability to pay contributions is statutory, to hold that delay automatically attracts damages would be too rigid a way of construing the Section, especially since the imposition of damages is punitive in nature. There must be application of mind taking into account the reasons for delay and whether the delay could have been avoided by ordinary diligence by the

> employer. For this, one cannot with any amount of certainty say what are the circumstances which would mitigate the damages and which would not. The same would differ from case to case, which requires exercise of judicial discretion by the authority imposing damages by application of mind to the circumstances pleaded and proved by the defaulting employer."

We are in complete agreement with the principles laid down in that decision and are of opinion that those principles squarely apply to the interpretation of Section 85-B of the ESI Act since the relevant provisions in the two beneficial legislations are in pari materia with each other.

14. While at it, we may also note a contention of the appellants to the effect that the damages leviable under Section 85-B is compensatory in nature and therefore damages cannot be decided by applying the principles applicable for imposing penalty alone. This question was answered in the negative as early as in 1980 by a Division Bench of this Court in E.S.I Corporation v. Meecos Ltd., 1980 KLT 179. The Division Bench in that decision described the character of the imposition as follows:

> "The Employees' State Insurance Act is intended to provide certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters relating to benefit to the employees. The scheme cannot be worked out without making effective provisions for levying contributions under the Act. The employer as well as the employees contributes which contribution is ploughed back for the benefit of the employees by working out various schemes intended to serve the employees covered by the Act. The time within which contributions are to be made is provided by the Act read with the Regulations made thereunder. S. 84 of the Act enables prosecution for false representations or false statements made with a view to avoid payment under the Act. Defaults to pay contribution under the Act or failure to furnish return under the Act and similar matters which would necessarily hamper the proper implementation of the Act are made punishable by S. 85 of the Act. Provision for enhanced punishment in cases of previous conviction is made under S. 85A of the Act. It is in that context that S. 85B appears in the Act and that provides for recovery of 'damages' where the employer defaults to pay

> contribution payable under the Act. But the Section provides that the recovery of such 'damages' shall not be in excess of the arrears and the amount of such damages is to be such as the Corporation may think fit to impose. Sub-section (2) of S. 85B enables recovery of such damages as an arrear of land revenue. It may also be pertinent to note that despite the provision for imposition of damages, there is an independent provision under S. 97(2)(iii-a) of the Act enabling regulations to be made in regard to levy of interest at a rate not exceeding 6 per cent per annum on contributions due, but not paid. That such Regulations have been made enabling interest to be levied at 6 per cent is admitted. The levy of interest at 6 per cent on the defaulted amount is therefore not as damages but as interest recoverable pursuant to the said Regulation. The power to impose damages is conferred on the Corporation notwithstanding the right to levy interest independently and evidently therefore 'damages' for delayed payment cannot be equated with interest on the defaulted payments. The statute contemplates liability for such damages when once failure to pay is established. What such damages should be in any specific case is another mater. The use of the term 'imposed' in S. 85B suggests that the 'damages' as contemplated in that section is different from the concept envisaged by that term in relation to contracts or torts. 'Imposition' is normally associated with the authority to create an obligation. Taxes are imposed, duties are imposed and penalties are imposed whereas damages in torts and contracts 'arise'. The damages contemplated in S. 85B is therefore not compensation for loss on account of the default of a party, but is in the nature of a penalty that could be imposed for non-compliance with the statute to the extent indicated."

(Emphasis supplied)

This decision is in keeping with the statutory provisions as obtaining now. The compensatory part is taken care of by other provisions in the Act for realisation of interest on the delayed payment. Even before a specific provision under the Act was introduced by way of sub-section (5) of Section 39 by Act 29 of 1989, the Employees State Insurance (General) Regulations contained a provision for recovery of interest on delayed payments, which was substituted by a notification dated 9-3-1983 reads as follows:

> "**31A. Interest on contribution due, but not paid in time**:- An employer who fails to pay contribution within the periods specified in regulation 31, shall be liable to pay simple

> interest at the rate of fifteen per cent per annum in respect of each day of default or delay in payment of contribution."

In fact, that regulation is referred to in the Meecos's case in the portion extracted above. The Parliament gave statutory backing to the power to levy interest by introducing sub-section (5) to Section 39 of the ESI Act itself which reads thus:

> **39. Contributions**:-
>
> xx xx xx
>
> (5) (a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment:
>
> Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.
>
> (b) Any interest recoverable under clause (a) may be recovered as an arrear of land revenue or under section 45C to section 45I.
>
> Explanation:- In this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934)."

In fact, in Indian Telephone Industries case also, after noting similar provisions in the EPF & MP Act and the Scheme thereunder, the learned Single Judge had also come to the same conclusion, which also we approve of. As such, the compensatory part has been taken care of by stipulating payment of interest for delayed payments and therefore it is abundantly clear that imposition of damages under Section 85B is purely penal in character and therefore the principles to be applied while computing the damages payable would be as applicable for imposition of penalties as elucidated by the Supreme Court in Hindustan Steel's case.

In view of our above findings, we are of opinion that applying the said principles to the present case, the fact that there were litigations pending between the parties in respect of the very liability of the respondents to pay contributions under the Act which led to delay in paying contribution were certainly matters which should have been taken into account by the appellants while determining the amount of damages under Section 85B. Likewise, the paucity of liquid cash which is not very uncommon cannot also result in a penalty without an appropriate probe into the causes thereof. Evidently, the Insurance Court has taken into account all those circumstances to come to the conclusion that the amount of Rs. 27,500/- would be the appropriate damages to be imposed on respondents in this case. When a fact finding authority has arrived at that conclusion taking into account all the facts, evidence and circumstances proved before it, we do not think that it is for us to hold otherwise, in exercise of our limited jurisdiction which can be exercised only to decide substantial questions of law under Section 82 of the E.S.I Act. Therefore, we do not find any merit in the contentions in this appeal and accordingly, the same is dismissed.

Sd/- M. Ramachandran, Judge.

Sd/- S. Siri Jagan, Judge.

Tds/

[True copy]

P.S to Judge.